

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:HMT:NEW:1:POSTF-123956-02
WFHalley

date: JUL 01 2002

to: Anthony Degricoli, Revenue Agent (LMSB), Team 1565
200 Sheffield Street, Mountanside, NJ 07092

from: Area Counsel
(Heavy Manufacturing and Transportation:Edison)

subject: [REDACTED], INC ([REDACTED]) Form 872
TIN: [REDACTED]

This memorandum supplements our 5/30/2002 response to your request for assistance dated April 29, 2002. This memorandum should not be cited as precedent.

ISSUE

Following a cash stock acquisition of [REDACTED] Inc. (taxpayer) by [REDACTED] who are the proper persons (i.e. officers or corporate employees): 1)to execute Forms 872, 870, etc., 2)to represent the taxpayer; and 3)to receive confidential tax information of the taxpayer with regard to the pre-acquisition final short period return for the period [REDACTED] to [REDACTED]?

CONCLUSION: The advice given in our 5/30/02 memorandum was reviewed by the National Office. They agreed completely with the advice we gave on issues one and two. While they also agreed with our conclusion on issue three (ie. that the "Power of Representation" document provided by the taxpayer was sufficient under Temp. Treas. Reg. § 301.6103(c)-1T(c)(1) to authorize disclosure of tax information to the four named individuals), they suggested we add that the "Power of Representation" as presently drafted does not authorize disclosure of tax information to anyone other than the four named individuals.

DISCUSSION: In the middle of the "Power of Representation" there is a paragraph which states:

"The taxpayer also authorizes tax information to be disclosed to other employees of the corporation, or employees of representatives appointed by a Power of Attorney, who are directed by the Taxpayer to attend meetings with the Internal Revenue Service"

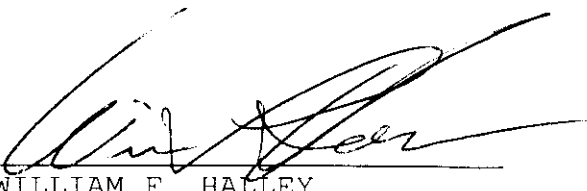
We believe this statement, attempting a blanket authorization to "other employees" and to "employees of representatives", is clearly **not** sufficient under the requirements of Temp. Treas. Reg § 301.6103(c)-1T. It does not satisfy the regulatory requirements that the designees' identity and the tax information to be disclosed be sufficiently identified. If the taxpayer wishes others to receive tax information a new document should be executed by an appropriate person. While the intended designees need not be specifically named, they have to be some sort of finite, identifiable group (eg. attorneys and accountants in the Tax Department). Also, the type of tax and tax years should be specifically mentioned.

If you have any questions, contact William F. Halley at (973) 645-3348.

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

JOSEPH F. MASELLI
Area Counsel
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By: 
WILLIAM F. HALLEY
Associate Area Counsel
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cc: Salvatore Labella, Team Manager, Team 1565

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:LM:HMT:NEW:1:POSTF-123956-02
WFHalley

date: May 30, 2002

to: Anthony Digricoli, Revenue Agent (LMSB), Team 1565
100 Dey Place, Edison, NJ 08817

from: Area Counsel
(Heavy Manufacturing and Transportation:Edison)

subject: [REDACTED], INC. ([REDACTED]) Form 872
TIN: [REDACTED]

This memorandum responds to your request for assistance dated April 29, 2002. This memorandum should not be cited as precedent.

ISSUE

Following a cash stock acquisition of [REDACTED], Inc. (taxpayer) by [REDACTED], who are the proper persons (i.e., officers or corporate employees) to execute Forms 872, 870, etc. and to represent the taxpayer and to receive confidential tax information of the taxpayer with regard to the pre-acquisition final short period return for the period [REDACTED] to [REDACTED]?

FACTS

Pursuant to a cash tender offer, an acquisition subsidiary of [REDACTED] acquired a controlling interest in the taxpayer on [REDACTED]. The taxpayer was the parent of a consolidated group (the [REDACTED]). As part of the acquisition, the acquisition subsidiary immediately merged into taxpayer and taxpayer was the surviving corporation. The [REDACTED] filed its final consolidated return for the short period ending [REDACTED]. The [REDACTED] ceased to exist on [REDACTED] pursuant to Treas. Reg. § 1.1502-75(d). For the periods after [REDACTED], [REDACTED] Inc. and its subsidiaries will be part of the [REDACTED] consolidated group. This was not a reverse acquisition under Treas. Reg. § 1.1502-75(d)(3).

While the [REDACTED] ceased to exist as of [REDACTED], [REDACTED] Inc. (taxpayer) remained in existence and pursuant to Treas. Reg. § 1.1502-77(a) continues to be the agent for the group for the pre-acquisition periods including the short period ending [REDACTED]

██████████. Following the acquisition, many of the officers of the taxpayer were replaced with former ██████████ employees.

The taxpayer has presented a Form 872-I statute extension signed by ██████████, the Vice President-Finance of ██████████, Inc. (he is a former ██████████ employee and was not the VP-Finance of ██████████, Inc. prior to the acquisition). The taxpayer has also presented a document entitled "Power of Representation, in accordance with Section 6103(e)(1)(D)(ii) of the IRC" signed by ██████████. This document purports to appoint ██████████ individuals (██████████ employees of ██████████, Inc. and ██████████ employees of ██████████) to represent the taxpayer before for IRS for the year ending ██████████. The form does not separately authorize a disclosure of tax information to the ██████████ employees but does authorize disclosure of tax information to "other employees...who are directed by the taxpayer to attend meetings with the IRS."

DISCUSSION

The questions presented by the examiners really involve 3 slightly different issues: (1) who is eligible to represent the taxpayer during the examination; (2) who can execute a Form 872-I Consent on behalf of the taxpayer; and (3) who is authorized to receive confidential tax information during the examination.

1. Representation - Absent a Power of Attorney, a corporation is represented by its high level corporate officers (i.e., those officers authorized by the corporation under applicable State law to legally bind the corporation). The President or Chief Executive Officer is clearly such a person. Any other person should be asked to verify (preferably in writing) that they have such authority. Such verification will be sufficient to protect the Service against a later claim of lack of authority. A Tax Director will generally not be such person. A corporate officer who has authority to bind the corporation can, of course, designate another corporate officer or employee to represent the corporation by executing a proper Form 2848 Power of Attorney. However, the person so designated must be eligible to practice before the IRS on behalf of the corporation. The Tax Director of the corporation is eligible, by regulation, to engage in such practice, if properly appointed.

2. Execution of Form 872-I - IRC § 6062 provides that corporate income tax returns shall be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to so act. With respect to other documents, Treas. Reg. § 1.6062-1(b) provides that such documents should be signed in accordance with the regulations contained in Chapter 61 or with the forms and

instructions issued with respect to such documents. For example, Form 8821 (Tax Information Authorization) states that it can be signed by an officer having authority to bind the corporation, a person designated by the Board or any officer or employee upon written request of a principal officer. With regard to execution of a Power of Attorney, Treas. Reg. § 601.503(c)(3) provides that in the case of a corporation it must be signed by an officer having authority to legally bind the corporation and who must certify that he/she has such authority. With regard to a Form 872, specifically, Rev. Rul. 83-41, 1983-1 C.B. 349 provides that any person described in section 6062 can execute such consent (i.e. the same persons who have authority to sign the return). For all of these documents, the current authorized officer is eligible to sign the document even if such officer was not an officer during the taxable year under examination.

3. Disclosure - The IRS may disclose tax information to the following classes of persons during a corporate examination:

a. Any person designated by resolution of the corporate board of directors or other similar governing body (IRC § 6103(e)(1)(D)(i));

b. Any officer or employee of the corporation upon written request signed by any principal officer and attested to by the secretary or other officer (IRC § 6103(e)(1)(D)(ii));

c. Any bonafide shareholder of record owning 1 percent or more of the outstanding stock of such corporation (IRC § 6103(e)(1)(D)(iii));

d. Any corporate officer authorized by the corporation in accordance with applicable State law to legally bind the corporation (IRM 1.3.2.4.3(1));

e. A corporate employee who is engaged in practice before the IRS and is covered by a duly executed Power of Attorney. (Form 2848 should be used for this purpose);

f. Any person pursuant to a disclosure consent under IRC § 6103(c) and Temp. Treas. Reg. § 301.6103(c)-1T (e.g. an employee acting as a contact point for the examination); and

g. To any person when necessary to obtain information not otherwise reasonably available, in accordance with IRC § 6103(k)(6) and Treas. Reg. § 301.6103(k)(6)-1 (This is a limited authorization which pertains to witnesses and not to regular audit contact points. These disclosures would be third party contacts).

With respect to to category (f) above (Section 6103(c) consents) the temporary regulations prescribe two types which could apply to designated contact points (i.e. General purpose consents and consents related to requests to provide information or assistance). Temp. Treas. Reg. § 301.6103(c)-1T(b) and (c).

Under the regulatory requirements for a general purpose consent, the consent must be in the form of a separate written document (such as one side of an 8½" by 11" piece of paper or a separate computer screen) pertaining solely to the authorized disclosure. Treas. Reg. § 301.6103(c)-1T(b). The document must be signed and dated by the taxpayer. In the case of a corporation, the consent must be signed by "any officer of the entity with authority under applicable State law to legally bind the entity[.]" Id. § 301.6103(c)-1T(e)(4). It must contain the identity of the taxpayer, the identity of the designee, the tax year, and the type of tax or items of tax information to be disclosed. The Form 8821 has been designed to meet the requirements of this part of the regulation.

A valid general purpose consent may be used to enable IRS revenue agents to disclose tax information to a person who is acting as a contact point with regard to an IRS examination. The consent must properly identify the type of tax or items of tax information to be disclosed. For example, if the examination is related to the corporation's Forms 1120 for 1995 and 1996, the relevant portion of the consent could state "1995 and 1996 Forms 1120."

Under Treas. Reg. § 301.6103(c)-1T(c), the IRS may sometimes disclose tax information to a third party when the taxpayer requests that such third party provide information or assistance with regard to a tax matter.

We believe that, where a corporate employee or other person (who is not practicing before the IRS) acts as a contact point for a corporate examination, disclosures under this part of the regulation would be appropriate. We therefore set forth below the requirements for such types of disclosures. Disclosures under this part of the regulation may be made pursuant to written or, under certain circumstances, nonwritten (oral) requests for information or assistance. Put another way, disclosures under this part of the regulation may be made pursuant to valid written or nonwritten consents.

Under Treas. Reg. § 301.6103(c)-1T(c)(1), the writing must be signed and dated by the taxpayer and contain the taxpayer's identity, the identity of the designee, and sufficient facts underlying the request for information or assistance to enable

the IRS to determine the nature of the assistance requested and the tax information to be disclosed. Under this part of the regulation, the writing does not have to pertain solely to the authorized disclosure--it may be included in another document. Thus, if an audit plan designates the corporate employees who will work with the IRS during the audit and receive tax information, and the audit plan is signed and dated by a high level official with authority to execute a consent, the audit plan may function as a consent under Treas. Reg. § 301.6103(c)-1T(c)(1).

Under Treas. Reg. § 301.6103(c)-1T(c)(2), a taxpayer may orally designate a third party to receive tax information in connection with the taxpayer's request for information or assistance in a tax matter. The IRS must obtain from the taxpayer sufficient facts to determine the nature of the assistance requested and the tax information to be disclosed to the third party. Moreover, before making disclosures the IRS must confirm the identity of the taxpayer, the identity of the designee, and the date, nature and extent of the assistance requested.

This regulation may apply in the case of an examination of a corporate taxpayer. For example, the president of a corporation could tell a revenue agent that "Your contact points for the examination are Mr. Smith and Mr. Jones, and I want you to work with them." In such situation, it is expected that the revenue agent will immediately record the date and the fact that the corporate president indicated that the IRS should work with Mr. Smith and Mr. Jones.

CONCLUSION

1. Pursuant to IRC § 6062 and Rev. Rul. 38-41 [REDACTED], the Vice President-Finance of [REDACTED], Inc. is a proper person to execute the Form 872-I, and such Form 872-I appears to be legally sufficient.

2. The "Power of Representation" submitted by the taxpayer is not and does not operate as a Power of Attorney and does not give the persons listed therein any power to execute any documents; bind the corporation or represent the taxpayer before the IRS. If the corporation wishes to have its Tax Director or Tax Manager act as its representative (i.e. with power to execute consents or otherwise bind the corporation) it must do so with a valid Power of Attorney. Form 2848 should be used. We do not believe the corporation can appoint an employee of [REDACTED] to be its representative unless such employee is otherwise eligible to practice before the Service (i.e. is an attorney, CPA or enrolled

agent). At present the only persons who can represent the taxpayer and/or execute documents are those officers who are authorized to legally bind the corporation. Officers other than the president or CEO should be asked to provide (preferably in writing) a statement that they are so authorized.

3. The "Power of Representation" although poorly drafted, probably is sufficient under IRC § 6103(e)(1)(D)(ii) and (e)(7) to permit disclosure to the two listed employees of [REDACTED] Inc. However, § 6103(e)(1)(D)(ii) does not apply to disclosures to employees of [REDACTED]. We do believe, however, that such "Power of Representation" is also sufficient as a section 6103(c) consent pursuant to Temp. Treas. Reg. § 301.6103(c)-1T(c)(1) (written request that a third party provide information or assistance in a tax matter) and as such would permit disclosures to all [REDACTED] of the named individuals.

If you have any questions, contact William F. Halley at (973) 645-3348.

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cc. Salvatore Labella, Team Manager, Team 1565